88-1205

Supreme Court, U.S.
FILED
JAN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

ROBERT L. BOGEN
BRAVERMAN & BOGEN
639 E. Ocean Ave.
Suite 209
Boynton Beach, FL

JAMES P. DURKIN
Suite 201
2605 E. Atlantic
Pompano Beach, FL

BENEDICT P. KUEHNE
Counsel of Record
SONNETT SALE & KUEHNE
One Biscayne Tower
Suite 2600
2 S. Biscayne Blvd.
Miami, FL 33131-1802
Tel: 305/358-2000

Counsel for Petitioner

60 pp

QUESTIONS PRESENTED

I. IS A MUNICIPALITY PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE DESIGN, SIZE, AND PLACEMENT OF A POSTAL-APPROVED MAIL RECEPTACLE?

II. WHETHER ENFORCEMENT OF A MUNICIPAL ORDINANCE REGULATING THE DESIGN OF A MAIL RECEPTACLE INFRINGES UPON PETITIONER'S FIRST AMENDMENT FREEDOM OF EXPRESSION, WHERE THE DESIGN IS CONSISTENT WITH FEDERAL REGULATION AND DOES NOT CONSTITUTE A DANGER TO PERSONS OR PROPERTY?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are Timothy Haggerty and the City of Pompano Beach, Florida.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	10
I. A MUNICIPALITY IS PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE DESIGN, SIZE, AND PLACEMENT OF A POSTAL-APPROVED MAIL RECEPTACLE.	10
II. ENFORCEMENT OF A MUNICIPAL ORDINANCE REGULATING THE DESIGN OF A MAIL RECEPTACLE INFRINGES UPON PETITIONER'S FIRST AMENDMENT FREEDOM OF EXPRESSION, WHERE THE DESIGN IS CONSISTENT WITH FEDERAL REGULATION AND DOES NOT CONSTITUTE A DANGER TO PERSONS OR PROPERTY	23
CONCLUSION	31
APPENDIX	32

TABLE OF AUTHORITIES

Page

Beverly v. United States,
468 F.2d 732 (5th Cir. 1972) 24

Black v. City of Berea,
32 N.E.2d 1 (Oh. 1941) 14

Buckley v. Valeo,
424 U.S. 1, 96 S.Ct. 612 (1976) . . 24

City of Pompano Beach v. Haggerty,
530 So.2d 1023 (Fla. 4th DCA 1988) 2, 10

First National Bank of Boston v. Bellotti,
435 U.S. 765, 98 S.Ct. 1407 (1978) . 24

Grover City v. U.S. Postal Service,
391 F.Supp. 982 (C.D.Cal. 1975) . . 20

Miami Herald Publishing Co. v. City of Hallandale,
734 F.2d 666 (11th Cir. 1984) . . . 27

Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue,
460 U.S. 575, 103 S.Ct. 1365 (1983) 28

New York State Commission On Cable Television v. F.C.C.,
669 F.2d 58 (2d Cir. 1982) 21

Pirolo v. City of Clearwater,
711 F.2d 1006 (11th Cir. 1983) . . . 21

Police Department of City of Chicago v. Mosley,
408 U.S. 92, 93 S.Ct. 2286 (1972) . 28

Sawyer v. Sandstrom,
615 F.2d 311 (5th Cir. 1980) 23

United States v. Albertini,
472 U.S. 675, 105 S.Ct. 2897 (1985) 26

United States v. City of Pittsburgh,
661 F.2d 783 (9th Cir. 1981) 21

United States v. O'Brien,
391 U.S. 367, 88 S.Ct. 1673 (1968) . 27

Constitutional Provisions and Statutes

United States Constitution
Art. I, §8 . . . . . .2, 13
Art. VI, Cl. 2 . . . . . .2, 12
Amendment 1 3
Amendment 5 3
Amendment 14 3

28 U.S.C. §1257(3) 2
39 U.S.C. §404(a)(1) 4
39 U.S.C. §101 13

City of Pompano Beach Municipal
Code Ordinance 100.35. 3

NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner, Timothy Haggerty, petitions for a writ of certiorari to review the judgment and decision of the District Court of Appeal of Florida, Fourth District, which upheld the authority of the City of Pompano

Beach to enforce its ordinances regulating the design, size, and placement of mail receptacles.

OPINIONS BELOW

The District Court of Appeal of Florida, Fourth District, announced its decision on August 31, 1988. City of Pompano Beach v. Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988) The court denied rehearing on October 4, 1988. Those decisions are reproduced in the Appendix. The final judgment of the trial court is also reproduced in the Appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. I, §8:

> The Congress shall have Power... To establish Post Offices and post Roads...

U.S. Constitution, Art. VI, Cl. 2:

> The Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...

U.S. Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...

U.S. Constitution, Fifth Amendment:

> No persons shall be deprived of life, liberty, or property without due process of law...

U.S. Constitution, Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law...

Ordinance 100.35, City of Pompano Beach:

> WHEREAS, the City has determined that private structures located in public right-of-way are detrimental to the public health, safety and general welfare; and

WHEREAS, the purpose of the public right-of-way is to provide a way of passage for the public, to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of public utilities; therefore to allow private structures to be located in the public right-of-way would defeat the purpose of public right-of-way; and

WHEREAS, the United States Congress has given the United States Postal Service the authority to promulgate regulations regarding the delivery of mail pursuant to Section 39 USC 404(a)(1); and

WHEREAS, pursuant to this authority the United States Postal Service has recognized that a municipality has the authority to completely prohibit curbside mailboxes in the Domestic Mail Manual [sic] Section 111.1 and Section 155.27; and

WHEREAS, the City of Pompano Beach recognizes that the curb side delivery of mail serves a valid public purpose, and

WHEREAS, the City, rather than prohibiting mailboxes in public right-of-way as a structure, desires to exempt such receptacles

provided they do not exceed certain limitations and thereby defeat the purpose of public right-of-way,....

BE IT ENACTED BY THE CITY OF POMPANO BEACH, FLORIDA:

SECTION 1: That Section 100.35 of the Code of Ordinances of the City of Pompano Beach entitled "BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS" is hereby amended to read as follows:

> 100.35 BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS (A) It shall be unlawful for any person to erect build, construct, deposit or place on or in any street, or any place where the public has the right of passage, any building, structure, or obstruction of any kind whatsoever, or to enclose any street, park, or other public property. Provided however, that a receptacle for the actual curb side delivery of mail shall not be prohibited pursuant to this section as long as such receptacle does not exceed five feet in height and is securely mounted on posts no larger than four-inch by four-inch or four and one-half inch diameter wood posts or two inch diameter standard steel or aluminum pipe buried no more

> than 24 inches in the ground and the receptacle for mail is located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.
> (B) Any building or structure abutting or encroaching on any public street, alley, or sidewalk in the city is hereby declared to be a public nuisance against the welfare and safety of the public, and the owner, lessee, or agent of the owner of any building allowing the building or structure to abut on or encroach on any public street, alley, or sidewalk, shall be held responsible to remove it and shall be guilty of a punishable violation.

STATEMENT OF THE CASE

Timothy Haggerty is a resident of the City of Pompano Beach, Florida. He has been engaged in a longstanding dispute with Pompano Beach officials concerning the design, size, and placement of his mailbox. In May 1982, Haggerty constructed an ornamental mailbox which he located in the swale area in front of his home. Nine

months later (February 1983), the City of Pompano Beach notified Haggerty that the placement of the mailbox in the City's right-of-way violated Municipal Ordinance 100.35. This ordinance prohibited the construction or placement of private structures or obstructions in the public right-of-way. The ordinance empowers City officials to issue citations for violations of the ordinance and provides for the removal of offending structures. When Haggerty refused to remove his mailbox, Haggerty was charged with a criminal violation of the ordinance.

In June 1983, Haggerty was found not guilty of the ordinance violation on the basis of selective enforcement of the municipal code. The evidence reflected that no other City resident had been prosecuted for this ordinance violation, despite the fact

that residents typically position mailboxes in the City's right-of-way. That decision was reversed by the appellate court. On retrial, Haggerty was found guilty, but that verdict was again reversed by the appellate court.

Haggerty then removed the original mailbox, and soon thereafter constructed a new one. This mail receptacle, still located in the swale, contains a flag pole upon which the American flag was flown. The mailbox was anchored below the surface by two engine blocks, which supported two pipes rising fifteen feet in the air. The mailbox complied with all postal regulations, and had been approved by Post Office inspectors.

When it became apparent that the City was intending to prosecute Haggerty anew, Haggerty initiated an action seeking injunc-

tive and declaratory relief against enforcement of the ordinance. Haggerty prevailed in that lawsuit, with the trial judge announcing a number of findings and conclusions in Haggerty's favor, including: (1) The City had received no notice from Postal Authorities that the mailbox violated postal regulations. (2) No other resident had been prosecuted for having placed a mailbox in the right-of-way, despite the fact that mailboxes were routinely placed in that location. (3) The mailbox did not constitute a hazard to persons or property. (4) The City ordinance ran afoul of the Supremacy Clause of the United States Constitution. (5) Haggerty was the victim of unconstitutional selective enforcement of the law. (6) Application of the City ordinance infringed upon Haggerty's First Amendment freedom of expression.

The City appealed from the order granting declaratory and injunctive relief. The appellate court agreed with the City's position, and reversed the trial court's order. City of Pompano Beach v. Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988). The appellate court concluded that the City's revised ordinance applied to Haggerty's mail receptacle and could be enforced.

REASONS FOR GRANTING THE WRIT

I. A MUNICIPALITY IS PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE DESIGN, SIZE, AND PLACEMENT OF A POSTAL-APPROVED MAIL RECEPTACLE.

This case raises a fundamental question of the extent to which a municipality can exercise jurisdiction in an area which is reserved to the federal government. The case itself pits a citizen, interested in expressing his artistic values concerning

the United States mails, and a local government set on quashing the citizen's right of expression. The particular object of this controversy, a mail receptacle, was designed by the citizen in a manner which comports with federal regulation, was situated in a location utilized by other citizens to receive their mail, and constituted no obstruction or potential injury to persons or property. The municipality, in it quest to rid the City of a mail receptacle which was not to its liking, enacted an ordinance which purported to regulate the design, size, and placement of mailboxes, and vest unbridled discretion in City officials. In so doing, the City overreached the bounds of its governmental authority and intruded into an area which is reserved to the federal government.

This case merits review by this Court because of the conflict between the Supremacy Clause and the decision of the lower tribunal. The important question of law presented in this appeal - the extent to which a municipality can attempt to regulate the United States mail - is a matter which requires the binding guidance of this Court, in order to prevent systematic intrusions into the needed uniformity of mail service. Without a final settlement of this matter, municipalities will be permitted to restrict the free flow of the United States mail by regulating the design, size, and placement of approved mail facilities. In so doing, the free flow of communication in our country will suffer an intolerable blow.

The United States Constitution provides that the laws of the United States represent the supreme law of the land. U.S. Const.,

Art. VI. One area in which the federal government is supreme is that involving postal services and the mails. As established by Article I, §8, the Congress has the exclusive power to regulate the mails. Congress has followed that constitutional mandate by giving to the United States Postal Service the exclusive authority to regulate and provide postal services to the people of the United States. 39 U.S.C. §101.

By virtue of that power, the Postal Service operates to provide prompt, efficient delivery of the mails. One necessary ingredient to that desirable goal is that of approving the use of mail receptacles and mailboxes, which promote the security of the mails and the convenience of delivery. It is the responsibility of the Postal Service to control the use of such receptacles.

Where a municipality acts to alter the carefully controlled and implemented scheme of the United States Postal Service concerning the delivery of the mails, the local government is outside the scope of its authorized powers.

Curiously, there exists very little litigation concerning the issue presented in this case, presumably because relevant decisions involving a conflict between postal authorities and local governments side unanimously in favor of the postal authorities. The only exception is the instant case. For example, the case of Black v. City of Berea, 32 N.E.2d 1 (Oh. 1941), involved a personal injury lawsuit against the city due to the plaintiff suffering injuries when her arm struck a mailbox located on the side of the road while she was riding as a passenger in an automo-

bile. The Ohio Supreme Court rejected the plaintiff's contention that the city was liable because, **as a matter of law**, the mailbox was not a nuisance since it was situated in a similar manner to other mailboxes in the area and the city had received no notice from the Post Office Department that the receptacle was contrary to postal regulations. The essence of the court's decision is succinctly stated, at 7:

> The postal patron derives his right to place a mailbox on a post road where such box is accessible to a mail carrier without leaving his vehicle, from the Constitution of the United States and laws enacted thereunder. It would seem clear, therefore, that the municipal authorities could take no action in respect to the location of the mailbox on a post road, unless and until it had been brought to their attention that such box was not located as required by the Post Office Department.

Berea conducted an exploration of the history of federal regulations in this area,

and concluded that federal control of postal receptacles was exclusive, at 6:

> While a city council might pass an ordinance attempting to regulate the location of rural mailboxes, yet before any such mailbox could be declared a nuisance, either under or in the absence of such ordinance, it would be necessary to show that it had not been so placed on a post road with the approval of an agent of the Post Office Department.
>
> We must not lose sight of the statement of law made by the Attorney General of the United States [opinions of Attorney General, Vol. 31, Page 73 (12-27-16)]: 'It follows that the fundamental test is not, whether the attempted State exertion will affect the exercise of a federal function to an extent that will demonstrably impair or impede the exercise of such function; it need only appear that the State has thereby in any degree laid its regulative hand upon such function.'

Against a claim that the municipality was indirectly responsible for the placement of mailboxes due to a local ordinance which entrusted the care, supervision, and control

of public highways to the city, the Court rejected the view that the ordinance justified any interference with the location of mailboxes. A municipal ordinance which attempts to conflict with or modify the superior power of the federal government with respect to postal matters and post roads is unquestionably in conflict with the exclusive federal jurisdiction in this area. Id. at 7.

The Berea decision was analyzed in Annotation, 132 A.L.R. 1401 (1941). That annotation reaffirmed the position that a local government has no ability to control or interfere with the design or placement of mail receptacles:

> To summarize the rulings laid down by these authorities, it appears that a city has no right to control or proscribe the design or style of letter boxes installed or to be installed upon its streets or parks or elsewhere within its limits; that a city has no right to proscribe the location

> of the mailbox placed by a patron of the rural mail route in accordance with the regulations of the Post Office Department and hence is under no duty to cause to be removed or be relocated a mail box which is so placed as to obstruct or be hazardous to travel upon the street, unless and until it is advised that such mailbox is not located in compliance with the regulations of the Post Office Department.

This standard is consistent with the position advanced by Haggerty and opposed by the Respondent and the lower tribunal. It is without dispute that neither Haggerty nor the City received any notice from the Postal Service that Haggerty's mail receptacle was not in compliance with postal regulations. To the contrary, a postal inspector examined Haggerty's mailbox and approved it as being in compliance with applicable regulations. Haggerty's mail receptacle was not unsafe and did not constitute an obstruction to pedestrian or vehicular traffic, nor did it

interfere with any utilities. Thus, the City had no lawful basis to challenge the placement of Haggerty's mailbox on public safety grounds. Yet, when the City attempted to impose its own regulations upon the postal functions which are exclusively within the control of the federal government, the City went too far. Such local regulations must fall under the Supremacy Clause.

This is not a situation involving one man's desire to erect a mailbox which is to his liking. Instead, the case transcends individual interests in focusing on the relationship between federal and local governments in an area which traditionally has been the sole concern of the federal government. Permitting a municipality to enact its unilateral laws affecting the design, size, and placement of mail recep-

tacles is just the beginning of an encroachment into the regulation of the mails. No matter how pure is the local government's interest in limiting roadside structures, it is the Postal Service which has sole control over structures which are necessary for delivery of the mails. Indeed, by permitting curbside delivery of the mails, the Postal Service has promoted the efficiency and economics of mail delivery, thus exercising its exclusive authority over postal costs. This economic concern is of considerable moment to the Postal Service. See Grover City v. U.S. Postal Service, 391 F.Supp. 982 (C.D.Cal. 1975).

Supremacy Clause litigation supports the position taken by Haggerty in this certiorari petition, that the lower tribunal acted contrary to the Constitution and existing precedent in allowing the City to

regulate the design, size, and placement of his mail receptacle, where such placement did not constitute a nuisance, an obstruction, or a hazard to the public safety. Where federal law has pre-eminence, as in postal regulations, local and state law which stands as an obstacle is void. New York State Commission On Cable Television v. F.C.C., 669 F.2d 58 (2d Cir. 1982).

One analogous area of federal supremacy is that of air traffic. When a municipality attempted to enact noise control ordinances which interfered with the progress of air traffic, the ordinance was held unenforceable in violation of the Supremacy Clause. Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983). Similarly, in United States v. City of Pittsburgh, 661 F.2d 783 (9th Cir. 1981), a municipal trespass ordinance was declared void where it had the

effect of requiring postal letter carriers to obtain consent from residents before crossing lawns in the course of delivering the mail. The court viewed the ordinance as interfering with the duty of the Postal Service to deliver mail efficiently, and thus struck down the ordinance.

Petitioner requests this Court to review the decision of the lower tribunal, which permits local authorities to reign supreme in matters of postal regulations, when that area is constitutionally reserved to the federal government. This case is important, because it spans the reach between effective and efficient postal services and the unilateral will of local governments to regulate mail receptacles as if they were not part of the federal postal scheme. This case presents a critical opportunity for this Court to bring clarity

to this extremely important area of constitutional law. So that the concerns of the Framers of our Constitution are served, this Court must issue its writ of certiorari to correct the manifest injustice and error found herein.

II. ENFORCEMENT OF A MUNICIPAL ORDINANCE REGULATING THE DESIGN OF A MAIL RECEPTACLE INFRINGES UPON PETITIONER'S FIRST AMENDMENT FREEDOM OF EXPRESSION, WHERE THE DESIGN IS CONSISTENT WITH FEDERAL REGULATION AND DOES NOT CONSTITUTE A DANGER TO PERSONS OR PROPERTY.

The Constitution authorizes local government to act in the public interest by regulating the activity of its citizens in certain matters. Such governmental authority cannot, under any circumstances, limit the constitutional and organic rights of the individual. Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). Among the constitutional rights which are protected from

unwarranted government interference are those guaranteed by the first amendment to the United States Constitution. Governments may not restrict such freedoms without a clear demonstration of a compelling government interest. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). Even where a local government submits the existence of compelling interest as a supporting basis for an ordinance, any such restrictive law must be narrowly drawn so as to involve no more infringement than is absolutely necessary. First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407 (1978); Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). Government regulation in the freedom of expression area is justified only where (1) the regulation is within the government's constitutional power; (2) the regulation furthers an important or substan-

tial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on first amendment freedoms is no greater than necessary to the furtherance of the governmental interest.

In the case before this Court, the City has offered a substantial government interest as a basis to stifle Haggerty's artistic and expressive freedom in connection with his design of a mail receptacle. The City's asserted interest, protecting the safety of persons and property and avoiding interference with the operation of utilities, is a worthwhile goal in the abstract. This interest is essentially unrelated to the suppression of free expression. Nevertheless, the method used by the City to enforce the ordinance and the City's selective enforcement of the ordi-

nance renders the City's regulation unavoidably in conflict with first amendment guarantees.

Petitioner recognizes that the first amendment does not require the voiding of a content-neutral regulation, which is enforced in a neutral manner, that merely burdens speech in an incidental way. United States v. Albertini, 472 U.S. 675, 105 S.Ct. 2897 (1985). Thus, even though the mail receptacle in this case was shown to constitute no obstruction or hazard to pedestrian or vehicular traffic, if the ordinance were enforced in an even-handed manner, Petitioner would have little complaint were the ordinance the least restrictive alternative available to the City. That is not the case here, as even the decision of the lower tribunal suggests. Because the burden on Haggerty's expression is greater than is

necessary and because the regulation itself does not promote a substantial government interest that would be achieved less effectively absent the regulation, first amendment concerns must take precedence. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968).

The ordinance in this case is a tool utilized by City officials at their discretion and whim, aimed at residents whose conduct is not to the City's liking rather than pursued in an above-board and even-handed manner. Where an ordinance which makes the enjoyment of guaranteed rights contingent upon the whim or caprice of a government official, the law represents unconstitutional censorship. See Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984).

The decision of this Court in Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983), demonstrates the propriety of Haggerty's claim. There, this Court noted that different treatment of those subject to an ordinance which incidentally infringes first amendment rights suggests that the regulatory goal is related to suppression of those rights, and thus the goal is presumptively unconstitutional. This same standard was utilized by the Court in Police Department of City of Chicago v. Mosley, 408 U.S. 92, 93 S.Ct. 2286 (1972), where the City of Chicago enacted an ordinance exempting peaceful labor picketing from its general prohibition on picketing near a school. This Court indicated that because city officials treated some picketing in a different manner from others, the

ordinance should be analyzed in terms of the Equal Protection Clause of the Fourteenth Amendment, which was closely intertwined with first amendment interests. Because the ordinance affected expressive conduct, it was unconstitutional in making an impermissible distinction between peaceful labor picketing and other peaceful picketing.

The ordinance in Haggerty's case and the City action utilized to enforce it deserve careful review by this Court. Although the City's ordinance was not intended to be applied to mailboxes, the ordinance was used to prohibit Haggerty's mail receptacle, even though other similar mailboxes in the City's right-of-way existed which were not made subject to the ordinance. City officials simply did not find favor with Haggerty's expression, and thus acted against him. This different treatment

suggests that the goal of the ordinance, as applied, was not unrelated to the suppression of Haggerty's expression, and thus the ordinance is presumptively unconstitutional as applied.

Because of the clash between individual expression and the scope of government regulation, a question which often pits local governments against the individual, this Court should evaluate the propriety of the municipal conduct. It is not appropriate for an individual, when expressing thoughts through artistic conduct, to be subservient to contrary governmental interests, where the individual's conduct is not threatening or dangerous to persons or property. The decision of the lower tribunal completely glosses over this critical constitutional issue. To prevent other municipalities from acting in the same

manner and to protect the individual in relations with local governments, this Court should grant certiorari review. Only by accepting this case can this Court protect the individual from this unnecessary and unlawful governmental assault.

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

ROBERT L. BOGEN
BRAVERMAN & BOGEN
639 E. Ocean Ave.
Suite 209
Boynton Beach, FL

JAMES P. DURKIN
Suite 201
2605 E. Atlantic
Pompano Beach, FL

BENEDICT P. KUEHNE
Counsel of Record
SONNETT SALE & KUEHNE
One Biscayne Tower
Suite 2600
2 S. Biscayne Blvd.
Miami, FL 33131-1802
Tel: 305/358-2000

Counsel for Petitioner

APPENDIX

CONTENTS OF APPENDIX

	Page
Order Denying Motion For Rehearing, entered October 4, 1988	App. 2
City of Pompano Beach v. Timothy Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988)	App. 3
Final Judgment of Trial Court, entered January 19, 1987	App. 16

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT, P. O. BOX A, WEST PALM BEACH, FLORIDA 33402

CITY OF POMPANO BEACH,

Appellant,

v. **CASE NO. 87-0442**

TIMOTHY HAGGERTY,

Appellee.

October 4, 1988

BY ORDER OF THE COURT:

ORDERED that Appellee's September 15, 1988 Motion for Rehearing is denied.

I hereby certify the foregoing is
a true copy of the original court order.

CLYDE L. HEATH
CLERK.

cc: Robert L. Bogen, Esq.
Sharon V. Delegal, Assistant City Attorney

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1988

CITY OF POMPANO BEACH,	)	**NOT FINAL UNTIL**
	)	**TIME EXPIRES TO**
Appellant,	)	**FILE REHEARING**
	)	**MOTION AND, IF**
v.	)	**FILED, DISPOSED**
	)	**OF.**
TIMOTHY HAGGERTY,	)	
	)	**CASE NO. 87-0442.**
Appellee.	)	
	)	

Opinion filed August 31, 1988

Appeal from the Circuit Court for Broward County; Robert C. Abel, Jr., Judge.

Sharon V. Delegal, Assistant City Attorney, Pompano Beach, for Appellant.

Robert L. Bogen of Braverman & Bogen, Fort Lauderdale, for Appellee.

DOWNEY, J.

Appellee, Timothy Haggerty, placed his "mailbox" in the swale in the public right-of-way beside the street in front of his house. Appellant, City of Pompano Beach, advised him that the mailbox, its mounting and its supporting members violated Ordinance

100.35 and ordered him to remove it. Haggerty refused and this litigation ensued.

Ordinance 100.35 of the City of Pompano prohibited the construction or placement of private structures or obstructions of any kind in the public right-of-way. Ordinance 100.39 authorizes city officials to issue citations for violations of the ordinance and provides for the removal of unauthorized obstructions.

The evidence showed that, in order to position the mailbox in the swale area, Haggerty apparently dug a large hole between the sidewalk and street and placed therein two truck engine blocks. The engine blocks serve as anchors for two one and one-half-inch water pipes that rise about fifteen feet into the air. Two horizontal bars are connected to the vertical pipes. The receptacle to receive the mail is attached to the

first horizontal bar approximately three feet from the ground. The second horizontal bar is located several feet above the mailbox. From the second bar, a two-inch gas pipe functions as a flagpole, extending approximately another nine feet into the air. At its widest part the structure supporting the mailbox is five or six feet wide. A newspaper article in the record describes the contraption as containing an old bed rame, part of a golf cart, and it was topped by a model airplane and an "Air Mail" designation. After the city had won round one of the ongoing litigation between the parties, the city, pursuant to Ordinance 100.39, removed the edifice entirely. When Haggerty won the next round, he rebuilt the mailbox and "accoutrements" in essentially the same form, except he added a flagpole with an American flag attached to it.

When Haggerty initially refused to heed the city's notices of violation, thematter wound up in the Broward County Court, resulting in a decision in Haggerty's favor. On appeal to the circuit court, that decision was reversed and remanded to the county court, where an order to remove the structure was entered. The city removed the structure and Haggerty appealed to the circuit court, which again reversed the county court on double jeopardy grounds. When the city notified Haggerty that it intended to further prosecute him for ordinance violation, Haggerty commenced this suit in the circuit court for injunctive and declaratory relief. The city has perfected this appeal from a judgment for Haggerty permanently enjoining enforcement of Ordinances 100.35 and 10039 against Haggerty, holding Ordinance 100.35 invalid on constitutional grounds, and

enjoining the city from further prosecuting Haggerty for construction of the mailbox structure.

Haggerty contends, on appeal, 1) that the ordinances in question violate Article VI, the Supremacy Clause, of the United States Constitution, to the extent they attempt to regulate the design an dlocation of mailboxes and their structures and supports, 2) that the city's selective enforcement of said ordinances violates Haggerty's right to equal protection of the law, 3) that the ordinances violate the due process clause of the federal and state constitutions by taking property without compensation, 4) that the city's attempts to remove Haggerty's structure with its flagpole for flying the American flag violates the first amendment in that it stifles Haggerty's right to free expression, and 5) that the ordinances have no standards

by which to determine the size and dimension of an appropriate mailbox and, thus, lend themselves to arbitrary application.

The city argues that there is no supremacy act violation in these ordinances because they do not conflict with any federal regulation regarding mailboxes and federal regulations specifically recognize a municipality's authority to act in this area. Domestic Mail Manual (DMM), §155.27. Next, the city contends there has been no showing of selective enforcement of the ordinances and, thus, no equal protection violation; no taking and, thus, no due process problem. Finally, the city argues that neither is there a first amendment violation involved because municipal regulations prohibiting private structures in public rights-of-way, in order to keep them open and available for proper public use, meet the test set for them in

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Since this appeal has been pending the city amended Ordinance 100.35 by Ordinance 87-30, which provides in pertinent part:

> WHEREAS, the City has determined that private structures located in public right-of-way are detrimental to the public health, safety and general welfare; and
>
> WHEREAS, the purpose of the public right-of-way is to provide a way of passage for the public, to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of public utilities; therefore to allow private structures to be located in the public right-of-way would defeat the purpose of public right-of-way; and
>
> WHEREAS, the United States Congress has given the United States Postal Service the authority to promulgate regulations regarding the delivery of mail pursuant to

Section 39 USC 404 (a)(1); and

WHEREAS, pursuant to this authority the United States Postal Service has recognized that a municipality has the authority to completely prohibit curb side mailboxes in the Domestic Mail Manual [sic] Section 111.1 and Section 155.27; and

WHEREAS, the City, rather than prohibiting mailboxes in public right-of-way as a structure, desires to exempt such receptacles provided they do not exceed certain limitations and thereby defeat the purpose of public right-of-way,...

BE IT ENACTED BY THE CITY OF POMPANO BEACH, FLORIDA:

SECTION 1: That Section 100.35 of the Code of Ordinances of the City of Pompano Beach entitled "BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS" is hereby amended to read as follows:

100.35 BUILDING OR OBSTRUCTION ON STREETS AND SIDEWALKS

(A) It shall be unlawful for any person to erect build, construct, deposit or place on or in any street, or any place where the public has the right of passage, any building, structure, or obstruction of any kind whatsoever, or to enclose any street, park, or other public property. Provided however, that a receptacle for the actual curb side delivery of mail shall not be prohibited pursuant to this section as long as such receptacle does not exceed five feet in height and is securely mounted on posts no larger than four-inch by four-inch or four and one half-inch diameter wood posts or two inch diameter standard steel or aluminium pipe buried no more than 24 inches in the ground and the receptacle for mail is located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.

(B) Any building or structure abutting or encroaching on any public street, alley, or sidewalk in the city is hereby declared to be a public nuisance against the welfare and safety of the public, and the owner, lessee, or agent of the owner

> of any building allowing the building or structure to abut on or encroach on any public street, alley, or sidewalk, shall be held responsible to remove it and shall be guilty of a punishable violation.

(Emphasis indicates new language.) Thus, at the present time the city still prohibits the placing of structures in the right-of-way except for mailboxes, which cannot exceed certain specifications. The amended ordinance is in reality a ratification and clarification of the administrative construction given its predecessor, Ordinance 100.35, much as was done in Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA), cert. denied, 249 So.2d 687 (1971), and approved by this court in Town of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974). As noted by the city in the instant case:

> The city ordinance while prohibiting all private structures and obstructions has always been interpreted to permit mailboxes as such

> facilities were not seen as structures. The ordinance has merely been amended to include the administrative interpretation of the ordinance as it applies to mailboxes and should therefore be applied to the matter before this court.

Appellee, Haggerty, has failed to address the city's contentions in this regard.

It is a rule of long standing that appellate courts will dispose of the case according to the law prevailing at the time of the appellate decision rather than the prevailing law at the time of the trial court's decision. Diffenderfer v. Central Baptist Church of Miami, 404 U.S. 412, 92 S.Ct. 574, 92 L.Ed.2d 567 (1972); Florida East Coast Railway v. Rouse, 194 So.2d 260 (Fla. 1966); Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA 1971). There is no fear of ex post facto legislation or improper retroactive application of the amended ordinance

here because there is no impairment of a contract obligation or vested right and the amended ordinance appears remedial in that it creates an exemption. See 49 Fla.Jur.2d Statutes §106, et seq. (1984). Moreover, "a mere change of language in a statute does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law." Id. §134. See also State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). Thus, it appears that, as in Tsavaras v. Lelekis, 246 So.2d 789 (Fla. 2d DCA 1971), because the ordinance in question did not change the existing law, but simply confirmed the city's interpretation of the ordinance and clarified its language, the amended ordinance should be applied.

If there remained any doubt about the effect of the clarification amendment and Haggerty's compliance with said ordinance we might resort to a temporary relinquishment of jurisdiction to allow the court to reconsider its judgment, as mentioned in Lelekis or a remand for further consideration as was done in Twon of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974). However, here there is no doubt that Haggerty is totally out of sinc with the purpose and intent of the prohibition against structures in the city's right-of-way, to say nothing of the specific limitations on size now spelled out in the amendatory ordinance.

Accordingly, we reverse the judgment appealed from and remand the case to the trial court with directions to enter judgment for the appellant, City of Pompano Beach.

WALDEN and GUNTHER, JJ., concur.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA.

CASE NO. 84-18276-CN

TIMOTHY HAGGERTY,	)	
	)	
Plaintiff,	)	
	)	**FINAL JUDGMENT**
v.	)	
	)	
CITY OF POMPANO BEACH,	)	
	)	
Defendant.	)	
	)	

THIS ACTION way tried before the Court. On the evidence presented, the Court makes the following findings of fact:

On or about May 31, 1982 Plaintiff constructed an unusually designed, rather ornate mailbox placed on the swale. On or about February 24, 1983, Defendant instituted proceedings for violation of Municipal Ordinance 100.35 for placing a mailbox in the City's right of way. On June 1, 1983 a nonjury trial was held before County Court Judge Mowry in which Plaintiff was found not

guilty on the basis of selective enforcement. Upon appeal this was reversed in the Circuit Court, Judge Coker presiding. On June 8, 1984, County Court Judge June Johnson found Plaintiff guilty of violating the Ordinance and he was required to remive the mailbox within 60 days. Upon further proceedings in the Appellate Court, Judge Mark A. Speiser presiding, this decision was reversed.

On August 21, 1984, Defendant, pursuant to the purported authority of Pompano Beach Municipal Ordinance 100.39, removed the mailbox. On or about August 27, 1984 Plaintiff constructed a second mailbox, this one containing a pole upon which the American Flag was flown. Such was also placed on the swale. Both mailboxes were located within the City's right of way. On August 28, 1984 and August 30, 1984, Defendant by certified mail, delivered to Plaintiff its notice of

intention to further prosecute Plaintiff for violation of Municipal Ordinances 100.35 and 100.39 based on the construction of the second mailbox. This action sought a permanent injunction prohibiting Defendant from removing the mailbox and a declaratory judgment determining that the subject ordinances were invalid.

The Court further finds, based upon the trial exhibits and testimony of witnesses, as follows:

The City has not received a notice from postal authorities that the subject mailbox was not in compliance with postal regulations. No citizen of the City of Pompano Beach, other than Plantiff, has been prosecuted under the subject ordinances for having placed a mailbox in the City's right of way, although other citizens have customarily used the City's right of way for mailboxes. The

mailbox is not a hazard to pedestrians or vehicular traffic and does not obstruct such traffic.

The Court makes the following conclusions of law:

Article VI, U.S. Constitution, containing the supremacy clause, prohibits the enforcement of the City of Pompano Beach Municipal Ordinances 100.35 and 100.39 insofar as they attempt to regulate the design and location of mailboxes and their structure and supports.

Plaintiff's Constitutional Equal Protection Rights have been violated according to the authority of Yick Wo vs. Hopkins, 118 U.S. 356, 373 (1886), in that while other citizens have been allowed to build mailboxes in the City's right of way, Defendant has been selected for prosecution under the

subject ordinances. See also Richey vs. Wells 166 So 817 (1936).

Both Federal and State Constitutions prohibit the taking of property without due process. Holland vs. Fort Pierce Financing & Construction Co. (1946) 157 Fla 649, 27 So 76; State Road Department of Florida vs. Tharp (1941) Fla 745, 1 So 2d 868. Defendant is prohibited from confiscating Plaintiff's property without compensation since the subject ordinances are not necessary for the preservation of public health or safety. Maxwell vs. Miami (1924) 87 Fla 107, 100 So 147, 33 ALR 682; Scoville vs. Miami Springs (1954) 6 Fla Supp 94, affd (Fla) 81 So 2d 188.

Plaintiff's flying of the American Flag is a method of expression within the freedoms guaranteed by the First Amendment to the U.S. Constitution. The ordinances in question are

unconstitutional insofar as they attempt to prohibit such expression. Miami Beach vs. Koehle 20 Fl Supp 121 (1973).

An enactment under the exercise of police power which is lawful on its face may not be enforced in such manner as to work a discrimination Miami Beach vs. Ben Howe Realty 168 Fl 2d 378; Franklin vs. White Egret Condominium 358 So 2d 1084. The actions of the City in the case sub judice as it affects this Plaintiff are contrary to said "Franklin" case supra.

The City has no standard for determining how any mailbox built within the City is not in compliance with City Ordinances. Defendant's enforcement of the ordinances are arbitrary, contrary to law and an unconstitutional attempt by the City to use its Police Power under the facts sub judice.

It is ADJUDGED as follows:

1. Defendant is permanently enjoined from enforcing its Ordinances 100.35 and 100.39 and other ordinances purporting to authorize the removal of the mailbox and or appurtenances, supports and attachments thereto, including the American Flag as constructed by Plaintiff at the premises 1650 N.W. 1st Terrace, Pompano Beach, Florida, on or about August 21, 1984.

2. Said ordinances are invalid insofar as they purport to authorize the removal of the said mailbox, its appurtenances and attachments and to the extent that they purport to do so, said ordinances are hereby declared unconstitutional.

3. Defendant is permanently enjoined from prosecution of Plaintiff under the authority of its Ordinances 100.35 and 100.39 for the building or maintaining of the mail-

box built on his premises on or abuot August 21, 1984.

4. This Court reserves jurisdiction for the purpose of enforcing the provisions of this Final Judgment.

5. This Court reserves jurisdiction for the purpose of awarding costs.

ORDERED at Fort Lauderdale, Broward County, Florida on this the ____ day of (Jan 19 1987), 1987.

JUDGE ROBERT C. ABEL, JR.
CIRCUIT JUDGE

Copies Furnished:

A TRUE COPY

Counsel of Record

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1205

In The

Supreme Court of the United States

October Term, 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

DONALD C. ROBERGE
City Attorney
P.O. Box 2083
Pompano Beach, Florida 33061
Counsel of Record

SHARON V. DELEGAL
Assistant City Attorney
P.O. Box 2083
Pompano Beach, Florida 33061
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

QUESTIONS PRESENTED (RESTATED)

I. IS A MUNICIPALITY PROHIBITED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM REGULATING THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE WHICH IS LOCATED IN THE PUBLIC RIGHT OF WAY.

II. DOES ENFORCEMENT OF A MUNICIPAL ORDINANCE WHICH REGULATES THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN PUBLIC RIGHT OF WAY VIOLATE THE FIRST AMENDMENT.

RULE 28.1 LIST

Respondent, City of Pompano Beach is a municipal corporation established under the laws of the State of Florida. Respondent was the Appellant/Defendant in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED (Restated) i

RULE 28.1 LIST ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 5

REASONS FOR DENYING THE WRIT 7

I. THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A MUNICIPALITY FROM REGULATING THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN THE PUBLIC RIGHT OF WAY 7

II. A MUNICIPAL ORDINANCE WHICH REGULATES THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN PUBLIC RIGHT OF WAY DOES NOT VIOLATE THE FIRST AMENDMENT 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Brickell v. Town of Fort Lauderdale, 78 So. 681 (Fla. 1918) 13

City of Pompano Beach v. Haggerty, 530 So. 2d 1023 (Fla. 4th DCA 1988) 9

Grover City v. United States Post Office, 391 F.Supp. 982 (C.D. Cal. 1975) 10, 11

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1941) 7

Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305 (1977) 7

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118 (1984) 13

Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981) 15

Ray v. Atlantic Richfield Co., 435 U.S. 151, 98 S.Ct. 988 (1978) 7

U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968) ... 12, 15

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES

United States Constitution

Art. I Sec. 8 8

Art. VI, Cl. 2 8

Amendment I 15

TABLE OF AUTHORITIES–Continued

Page

Statutes

39 U.S.C. 201 ..... 1, 8

39 U.S.C. 401(2) 1, 8

39 U.S.C. 403(a) 2, 10

Domestic Mail Manual

Section 111.1 ..... 3, 8

Section 151.1 ..... 3, 8

Section 155.232 ..... 3, 8

Section 155.27 ..... 4, 8

Section 156.531 ..... 4, 8

City of Pompano Beach Code of Ordinances
Section 100.35 .....5, 6, 13

No. 88-1205

In The

Supreme Court of the United States

October Term, 1988

TIMOTHY HAGGERTY,

Petitioner,

versus

CITY OF POMPANO BEACH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

CONSTITUTIONAL AND STATUTORY PROVISIONS (NOT INLCUDED IN PETITIONER'S BRIEF)

39 U.S.C. Sec. 201. United States Postal Service.

There is established, as an independent establishment of the government of the United States, the United States Postal Service.

39 U.S.C. Sec. 401. General powers of the Postal Service.

The Postal Service shall have the following general powers:

. . . .

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

39 U.S.C. Sec. 403. General duties.

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service –

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such users.

DOMESTIC MAIL MANUAL, SECTION 111.1

111.1 General

This manual contains the regulations of the United States Postal Service governing its domestic mail services. These regulations include the rates for postage and restrictions on its use, descriptions of the classes of mail and special services and conditions governing their use, requirements for wrapping and mailing, explanations of collection and delivery services, and general provisions concerning the use of postal services and facilities.

DOMESTIC MAIL MANUAL, SECTION 151.1

151.1 Designation As Authorized Depository.

Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1701, 1705, 1708, and 1725, except that door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 and not private mail receptacles within the meaning of 146.2. The post is not part of the receptacle.

DOMESTIC MAIL MANUAL, SECTION 155.232

155.232 Curbside Delivery.

Delivery may be provided to boxes located at the curb so they can be safely and conveniently served by the carrier from his vehicle.

DOMESTIC MAIL MANUAL, SECTION 155.27-155.272

155.27 Local Ordinances.

If a customer chooses not to erect a curbside box because of a local, city, county, or state ordinance prohibiting the installation of mailboxes at the curb, the delivery options in establishments and extensions are:

155.271 Central delivery services may be provided at one or more central points in a residential housing development, community or area, if:

a. The local postal managers approve the mailbox sites and equipment;

b. There is a minimum of two mailboxes erected at each mailbox site (there is no maximum limit); and

c. The customers are not required to travel an unreasonable distance to obtain their mail; or,

155.272 Post office box or general delivery service may be provided at the nearest postal facility where carrier delivery emanates.

DOMESTIC MAIL MANUAL, SECTION 156.531

156.531 Construction

Posts or other supports for rural boxes must be neat and of adequate strength and size. They may not be designed to represent effigies or caricatures that would tend to disparge or ridicule any person. The box may be attached to a fixed or movable arm.

STATEMENT OF THE CASE

The Petitioner, Timothy Haggerty, has placed on the Public right of way in front of his residence two different structures which he refers to as "mailboxes". The second structure which prompted this litigation consists of two truck engine blocks which serve as anchors for two and one-half inch water pipes that rise about fifteen feet in the air. Two horizontal bars are connected to the vertical pipes. The receptacle for mail is attached to the first horizontal pipe which is located about three feet from the ground, the second horizontal pipe is located several feet above the mailbox from which a two inch gas pipe rises into the air and functions as a flagpole. The first structure erected by the Plaintiff was similar in size and structure.

The City of Pompano Beach had in effect at the outset of the proceedings involving Mr. Haggerty an ordinance which prohibited structures in the right of way (Pompano Beach Code of Ordinances Section 100.35). The ordinance as originally drafted did not specifically address mailboxes but was interpreted and enforced by the City to allow a receptacle for the curbside delivery of mail in the right of way (The ordinance was amended by the City prior to the District Court of Appeal of the State of Florida Fourth District's review and the amended ordinance was before that Court. The amended ordinance specifically addresses mailboxes and permits them in the public right of way provided they do not exceed certain height and size limitations).

The City took the position that the structure was in violation of Sec. 100.35 of the Code of Ordinances based on the way the structure was fastened to the ground and the size of the structure. Mr. Haggerty was cited and a

non-jury trial was held before County Court Judge Mowry in June of 1983 at which time Mr. Haggerty's Motion to Dismiss on selective enforcement grounds was granted without prejudice. An appeal followed and the decision was reversed. Upon remand, a trial was held before County Court Judge June Johnson and Mr. Haggerty was found in violation of the ordinance. The City removed the Petitioner's structure.

Mr. Haggerty filed an appeal from the County Court decision, however, prior to the Appellate Court decision which reversed the lower court on double jeopardy grounds, Mr. Haggerty erected the second structure.

The City sent notices of violation for the second structure and the structure was removed and Mr. Haggerty then filed a complaint seeking a Declaratory Judgment and Injunctive relief. A non-jury trial was held and Circuit Court Judge Abel entered an Order permanently enjoining the City from enforcing its Ordinance against the Plaintiff and declaring the Ordinance invalid insofar as it purports to authorize the removal of the mailbox, its appurtenances and attachments.

Subsequent to the trial court decision and while the appeal was pending, the City Commission of the City of Pompano Beach amended Section 100.35 to exempt from the prohibition of structures in the public right of way, receptacles for the actual curbside delivery of mail as long as such receptacle does not exceed 5 feet in height and is securely mounted on posts no larger than 4 inch x 4 inch or 4 1/2 inch diameter standard steel or aluminum pipe buried no more than 24 inches in the ground and is

located in a manner which does not obstruct vehicular or pedestrian traffic or pose a public safety hazard.

The District Court of Appeal of the State of Florida Fourth District applied the revised ordinance and reversed the trial court.

REASONS FOR DENYING THE WRIT

I.

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A MUNICIPALITY FROM REGULATING THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN THE PUBLIC RIGHT OF WAY.

In determining whether a state statute is preempted by federal law a two prong test has been developed - the first inquiry is whether Congress has prohibited state regulation, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977) and second, if Congress has not completely foreclosed state legislation, a state statute is void to the extent it actually conflicts with the federal statute, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994 (1978) and in determining whether there is a conflict the Court's primary function is to determine whether under the circumstances of the particular case, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941). The issue sub judice is whether a municipal ordinance which prohibits structures in the public right

of way but allows an exception for receptacles for the curbside delivery of mail provided the post does not exceed certain size limitations violates the Supremacy Clause, Art. VI, Cl. 2.

Congress has been vested with the authority to establish post offices and post roads, U.S. Constitution, Art. I, Sec. 8, and pursuant to this authority Congress has established the United States Postal Service to conduct the postal services of the United States, 39 U.S.C. 201, and has given that body the power to adopt rules and regulations to accomplish its objective, 39 U.S.C. 401(2). The Postal Service pursuant to this grant of power, has enacted the Domestic Mail Manual which contains the regulations of the United States Postal Service governing its domestic mail service (Domestic Mail Manual 111.1). Chapter 155 of the Domestic Mail Manual provides the regulation for the City delivery of mail, Section 155.232 provides for curbside delivery as follows:

> Delivery may be provided to boxes located at the curb so that they can safely and conveniently be served by the carrier from a vehicle.

Section 155.27 of the domestic Mail Manual provides

> If a customer chooses not to erect a curbside box *because of local, county of state ordinance prohibiting the installation of mail boxes at curb,* the delivery options in establishments and extensions are: . . . (emphasis added).

Chapter 151 "Mail Receptacles" Subsection 151.1 provides:

> The post *is not* part of the receptacle (emphasis added).

Section 156.531

> . . . posts or other supports for rural mail boxes must be neat and of adequate strength and size. It may not be designed to represent effigies of caricatures that would tend to disparage or ridicule any person.

It is clear from the above cited regulations that not only has the postal service not intended to completely prohibit local regulation in the area of the placement of mail receptacles at the curbside but rather has also specifically recognized a municipality's authority to completely prohibit curbside mailboxes and provides for alternative delivery methods in this event. The postal service has also determined that the post is not part of the mail receptacle and that a mail box is a mail receptacle attached to a post of adequate strength and size to support the structure and therefore city regulations addressing the size of such posts and the depth of anchoring the same, do not conflict with the federal regulatory scheme.

The Fourth District Court of Appeals' opinion contains the following description of the Petitioner's structure: . . .

> Haggerty apparently dug a large hole between the sidewalk and street and placed therein two truck engine blocks. The engine blocks serve as anchors for two one and one-half inch water pipes that rise about 15 feet into the air. Two horizontal bars are connected to the vertical pipes. The receptacle to receive the mail is attached to the first horizontal bar approximately three feet from the ground. The second horizontal bar is located several feet above the mailbox. From the second bar, a two inch gas pipe functions as a flagpole, extending approximately another nine feet into the air. At its widest part the structure supporting the mailbox is five or six feet wide *City of Pompano Beach v. Haggerty*, 530 So. 2d 1023, 1023-1024 (Fla. 4th DCA 1988).

It is evident from the above description that the Petitioner's structure is much more than a mailbox but rather is a large contraption which incidentally contains a receptacle for the delivery of mail on it. To follow the Petitioner's preemption argument to its logical conclusion is to conclude that an individual is free to construct any structure he desires in disregard of all zoning, building, fire, health and safety codes upon any property he desires and by placing a receptacle for mail on the structure all governing jurisdictions except the United States Postal Service are preempted from enforcing any of the appropriate health and safety codes which would be applicable but for the placement of the mailbox. However, the general purpose of the Postal Authority is not to become involved in building, zoning and other public safety matters but rather is to plan, develop, promote and provide adequate and efficient postal services at fair and reasonable rates, 39 U.S.C. 403(a) and therefore the state regulation in this area does not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

The case of *Grover City v. United States Post Office*, 391 F.Supp. 982 (C.D. Cal. 1975) supports the city's view of lack of preemption in the case sub judice. The facts of the case involve an attempt by Grover City to prohibit all curbside mailboxes within the City. However, Grover City did not stop there but also attempted to *require* the postal authority to provide a certain type of mail delivery. The court held that since the United States Postal Service had regulations regarding the criteria for the types of delivery service it would provide to customers, the City was not free to dictate the type of delivery to be

provided by the Postal Service. The Court's rationale is premised on the doctrine of preemption as there was a clear conflict between the City's attempt to dictate the type of delivery and the postal regulations. However, the Court also stated:

> The Postal Service is taking no action to interfere with the enforcement of the enactment in question (prohibition of curbside mail boxes). All the postal service has done is to honor the choices made by its postal customers, continuing to offer curbside services to all eligible, but providing it only to those who comply with the conditions set forth in the postal regulations. In these circumstances, *it is clear that the postal service has not foreclosed the City from promulgating or enforcing its ordinance,* but rather has offered its customers the remaining delivery alternative without allowing the City to dictate or vary national delivery policy by means of a local enactment. *Grover* at 986. (Clarification, emphasis added).

The Court in *Grover City* held that a City may enact and enforce ordinances relating to mail boxes so long as such ordinances do not dictate or vary national delivery policy and the same principal is applicable to the situation at issue. The City of Pompano Beach has determined, in the exercise of its police power, that public right of way should remain open and available for its public purpose and has therefore prohibited the placement of private structures in the right of way. However, the City has also determined that the curbside delivery of mail serves a valid public purpose and has therefore authorized placement of receptacles for the delivery of mail in the right of way provided the mail receptacles do not exceed certain size restrictions nor obstruct vehicular or pedestrian traffic or pose a safety hazard. Such action on

the part of the City does not conflict with federal law as the United States Postal Service has specifically recognized the City's authority to completely prohibit curbside mailboxes in its jurisdiction and the City's restrictions on the size of the posts do not conflict with the requirement of the Postal Authority as the City's restrictions insure that the posts are of adequate strength and size to support the mailbox which is all the Postal Service requires.

II.

A MUNICIPAL ORDINANCE WHICH REGULATES THE HEIGHT AND SIZE OF THE SUPPORTING POSTS FOR A U.S. MAIL RECEPTACLE LOCATED IN THE PUBLIC RIGHT OF WAY DOES NOT VIOLATE THE FIRST AMENDMENT.

In *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 1678 (1968) this Court set forth the following test to determine whether a governmental regulation which affects symbolic speech was justified:

1. Is the regulation within the constitutional power of government.
2. Does the regulation further an important governmental interest.
3. Is the governmental interest unrelated to free speech, and
4. Is the regulation no greater than essential to the furtherance of that interest.

The Florida Supreme Court held many years ago "where the dedication to the public use is made of the street or roadway and the same is used by the public, it is the *duty* of the City as a trustee of the public rights in and

to the streets within whose corporate limits they are, to maintain the public uses against encroachment." *Brickell v. Town of Fort Lauderdale,* 78 So. 681, 685 (Fla. 1918). Therefore it is within the constitutional authority of the municipality to regulate its public right of way.

The City of Pompano Beach has stated in the preamble to the latest revision of the ordinances (City of Pompano Beach Code of Ordinances Sec. 100.35) the following purpose for public right of way:

> It is to provide a way of passage for the public, and to provide an area for drainage, to provide an open area between the paved portion of the roadway and the placement of structures, to provide an area for the installation and maintenance of the public utilities and therefore to allow private structures to be located in the public right of way would defeat the purpose of public right of way.

The City Commission however in recognition of the valid public purpose and convenience of curbside mail delivery determined to exempt mail receptacles provided they did not exceed certain size limitations thereby defeating the purpose of public right of way. In *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118 (1984) a municipal ordinance prohibiting the posting of signs on public property was upheld and a determination was made that the city's interest in eliminating visual blight and promoting esthetics were sufficiently substantial governmental interests to justify the restrictions on the free exercise of expression. The Respondent city's interests in the matter at hand are likewise substantial and justify the incidental restriction on expression which results from the ban of private structures in public right of way.

The governmental interest is also unrelated to the suppression of free expression as the ordinance prohibits all private structures unless the structure is a receptacle for the curbside delivery of mail. The Petitioner takes issue with this part of the test based on the fact that the City's ordinance prior to the Appellate proceedings did not address mailboxes but rather prohibited all private structures but was interpreted and enforced by the City to allow mailboxes. However, the City's ordinance now in effect and applied to the Petitioner's structure by the Appellate Court specifically allows mailboxes provided they do not exceed 5 feet in height and are securely mounted on posts no larger than 4" x 4" or 4 1/2" diameter wood post or 2" diameter standard steel or aluminum pipe buried no more than 24" in the ground. Thus the ordinance applies equally to all private structures located in the public right of way and is content neutral.

The ordinance merely prohibits private structures on public right of way. The effect of the ordinance is no greater than necessary to accomplish the City's purpose which is to keep public right of way available for its public purpose. The Petitioner is free to get his message across to whomever he desires by placing his structure on his private property in compliance with all applicable zoning and building codes and therefore the Petitioner and all others similarly situated are not foreclosed from exercising their freedom of expression provided they do so outside of the public right of way or within the size limitations for mail receptacles which are placed on the public right of way.

The City's ordinance meets the test set forth in *O'Brien* and while the ordinance may incidentally infringe on the Petitioner's desire to place a symbol in public right of way the fact that the ordinance presents a First Amendment issue is not necessarily to say it constitutes a First Amendment violation, *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 561, 101 S.Ct. 2882, 2920 (1981).

CONCLUSION

For the reasons stated, this Court should deny to issue a Writ of Certiorari to review the judgment of the Court below.

Respectfully submitted,

DONALD C. ROBERGE
City Attorney
P.O. Box 2083
Pompano Beach, Florida 33061
Counsel of Record

SHARON V. DELEGAL
Assistant City Attorney
P.O. Box 2083
Pompano Beach, Florida 33061
Counsel for Respondent